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August 17, 2020

VIA CM/ECF

The Honorable Leonard P. Stark
Chief U.S. District Judge, District of Delaware
J. Caleb Boggs Federal Building
844 N. King Street
Unit 26, Room 6124
Wilmington, DE 19801-3555

Re: Xcoal Energy & Resources v. Bluestone Energy Sales Corporation et al., Case No. 18-819-LPS

Dear Chief Judge Stark:

Defendants and Counterclaim Plaintiffs in the above-referenced action, Bluestone Energy Sales Corporation, Southern Coal Corporation, and James C. Justice, II (collectively, “Defendants”) hereby respond to the Court’s August 14 oral Order (D.I. 100), and, consistent with the guidance set forth therein, respectfully renew their request to convert the trial in this matter to a partially-remote, or in-person, trial.

Ever since the Court ordered trial to proceed virtually, Defendants have exhausted efforts of how we could support this concept. However, as Defendants have continued to prepare for trial, it is becoming more and more apparent that the need to have all of the witnesses live in a traditional trial setting is paramount. Since receiving Your Honor’s oral Order on August 14, Defendants have tried our best to come up with a workable “quasi-virtual” process, pursuant to having certain “major” witnesses testify live in Delaware and other “non-major” witnesses testify virtually. However, Defendants have not been able to affirmatively identify witnesses as solely “major” versus “non-major” because, as Your Honor knows, trials are extremely fluid and can hinge on the credibility of a single witness or statement. It is not always identifiable in advance who the “major” and “non-major” witnesses are or whom the statements will come from.

Additionally, Defendants have also tried to generate suggestions and protocols to offer if witnesses do appear live during the coronavirus pandemic, prior to the widespread availability of a vaccine. We considered various trial plans which included requiring masks, social distancing in the pews of the courtroom, designated areas for public seating, virtual exhibit presentation and witness separation. We also considered options that included a part-live/part-virtual trial. We also consulted other states’ COVID trial practices as well as the Center for Disease Control Guidelines in an attempt to formulate a suitable trial plan that protects everybody – witnesses, attorneys, Court staff, and Your Honor – from this terrible pandemic. Unfortunately, despite our

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best efforts, Defendants believe that it is impossible to propose a plan that would totally ensure safety of the Judge, the court staff, the attorneys, the witnesses and other essential parties, given the close proximity, use of common seating, microphones and other support equipment.

Respectfully, Defendants believe the only way to effectively try this case is to have all defense witnesses, as well as the Xcoal witnesses, live in a traditional setting. Everyone on our side continues to be very mindful and extremely respectful of the virus and the negative health consequences. We are prepared for the trial, we are ready to try the case now, and we want to try the case now. However, considering our strong feelings about the importance of a trial with a traditional setting, we very respectfully request that you defer the presentation of all evidence until a time when it can be done safely, and in-person. Such a result would further the aims of justice and would not prejudice the rights of any party.

Counsel for Defendants are available to discuss this request with Your Honor at the Court's convenience.

Respectfully,

/s/ John A. Sensing

John A. Sensing (No. 5232)

cc: Richard A. Getty, Esq.
Danielle Harlan, Esq.
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